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December 9, 2008

VIA U.S. MAIL & FACSIMILE (916) 327-2026

Chairman Johnson and Commissioners
Fair Political Practices Commission
428 J Street, 8th Floor
Sacramento, CA 95814

Re: Adoption of Regulation 18521.5 – Ballot Measure Committees Controlled by
Candidates for Elective State Office

Dear Chairman Johnson and Commissioners:

We are counsel to the California Dream Team ("CDT"), a general purpose ballot measure committee formed to support and oppose California ballot measures which is controlled by Governor Arnold Schwarzenegger. CDT is also a nonprofit corporation which has been determined to be exempt from federal income tax.

We urge the Commission to reject proposed Regulation 18521.5¹ in its present form because it raises significant and troubling constitutional and statutory authority issues.

Currently, candidates for elective state office (which include state officeholders – see section 82007) can form and control general purpose ballot measure committees. Such committees can be used to solicit and expend funds to support or oppose two or more ballot measures and to advocate for legislative alternatives to ballot measures. (See section 82027.5.) Like all general purpose recipient committees regulated under the Political Reform Act, such committees are currently subject to highly-detailed and timely reporting requirements.²

¹ All regulatory references are to Title 2 of the California Code of Regulations, and all references to "sections" are to Government Code statutes, unless otherwise indicated.

² In connection with the general election held on November 4, 2008, all active state general purpose recipient committees were required to file semi-annual reports approximately 3 months before the election, as well as two separate pre-election reports in the weeks prior to the election. All such

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Proposed new regulation 18521.5 (entitled "Ballot Measure Committees Controlled by Candidates for Elective State Office" and dated 11/13/08) states that a candidate for elective state office may no longer control general purpose ballot measure committees. Under the new regulation, a ballot measure committee, controlled by a candidate, must be organized as a primarily formed committee. Most noteworthy is the fact that the proposed regulation *bans* a candidate (and even a separately-formed general purpose committee that wants to work jointly with a candidate) from opening a committee to oppose one or more measures, until *after* the measure's proponents are already up and running.³

Though government has a significant interest in preventing undue influence and the perception of undue influence, created by large contributions given to candidates through contribution limits, "there is no significant state or public interest in curtailing debate and discussion of a ballot measure." See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296-299 (1981). The government may not merely assume that the limits on contributions, and thus the associational rights of candidates, are necessary to meet the government's interest in preventing corruption. *Citizens for Clean Government v. City of San Diego*, 474 F.3d 647, 653-654 (2007 9th Cir.).

This proposed regulation places a significant burden on the associational rights of candidates and is not closely drawn to further the state's interest. It does not merely limit contributions to ballot measure committees, it *prohibits all opposition ballot measure activity* by a candidate until after an opponent's "Yes" campaign is underway. Since public discussion regarding ballot measures frequently occurs prior to the point ballot measures are actually drafted and submitted, this portion of the proposed regulation is an unconstitutional restriction on the right of candidates and their allies to meaningfully participate in the initial phase of ballot measure campaigns. If a candidate opposes pre-ballot measure issues, such candidates and committees are *prohibited* from soliciting or expending funds to speak against such issues until *after* the proponents of such issues have already: (1) formed a committee; (2) reduced their stance on the issues to the form of a ballot measure submitted to the Attorney General for title and summary; or (3) been legally required to place the ballot measure on the ballot. (See proposed Reg. 18521.5 (c).) By prohibiting a candidate from effectively engaging in the vigorous public debate

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reports, which disclose detailed financial information about the activities of such committees, are required in addition to the filing of, e.g., any independent expenditure and late contribution reports (which must be filed on a 24-hour turnaround basis all the way up to election day), and the filing of reports – within 10 business days – by committees subject to electronic filing that receive contributions or make independent expenditures of \$5,000 or more to support or oppose single state ballot measures.

³ See the broad definition of "Controlled Committee" (§ 82016) to understand how committees working "jointly" with candidates are deemed to be "controlled" by them under the Act.

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that precedes ballot measure campaigns, the proposed regulation raises serious constitutional questions.

In addition, the November 13, 2008 staff memo to the Commission makes reference to the practice of certain candidates who ran "surrogate campaigns" for office during the 2003 recall gubernatorial campaign by utilizing "ballot measure advertisements opposing Proposition 54 to promote a replacement candidate" (See 11/13/08 Staff Memo, pp. 2-3.) The memo concludes that Regulation 18521.5 advances the likelihood that funds raised into ballot measure committees controlled by candidates for elective state office will in fact be used to support or oppose real ballot measures" (*Id.* at 3.)

We disagree. We do not see how forcing candidate-controlled ballot measure committees to form as primarily formed committees, as opposed to general purpose committees, would in any way change this political calculation. Running an election campaign out of a ballot measure committee is already prohibited. (See §§ 85301-85303; Elections Code § 18680.) The Commission already strengthened its enforcement powers with regard to this issue by promulgating a regulation to impose additional reporting requirements and limit contributions to fund ads that identify, but do not expressly advocate the election or defeat of a candidate, within 45 days of an election. (See Section 85310(c) and FPPC Regulation 18531.10.) Moreover, if the problem this regulation is trying to address is a concern that a candidate may seek to raise his or her public profile by advocating for the passage of ballot measures, the concern is misplaced. Advocating for ballot measures, or legislative alternatives to ballot measures, is perfectly legal and part of our political system. It is not a valid topic for regulation any more than prohibiting the holding of a lower office to raise a candidate's profile for higher office would be.

We also question whether the Commission has the statutory authority to enact the proposed regulation. In *Citizens to Save California v. FPPC*, 145 Cal.App.4th 736 (2006), the plaintiffs sought a preliminary injunction and declaratory judgment against the promulgation of a regulation which imposed limits on contributions to ballot measure committees controlled by political candidates. They argued that the regulation conflicted with the Act and infringed upon First Amendment freedoms of speech and association. The court agreed, stating that the effect of the regulation was at odds with the language of the Act and was inconsistent with the legislative intent underlying the Act's contribution limits. *Id.* at 751. The court agreed with arguments that the effect of the regulation would inhibit a candidate's involvement in the initiative process. *Id.* The court also agreed that the restriction conflicted with the voters' concerns, as expressed in the ballot proposition, that candidates devote insufficient time to matters of public policy. *Id.* The court noted that the purpose of the Act was to provide individuals and interest groups with a fair and equitable opportunity to participate in the elective and governmental process, not to restrict those opportunities. *Id.* at 751-752. Thus, the court held that the regulation was invalid and inconsistent with the Act.

The arguments raised in *Citizens to Save California* are germane to the proposed adoption of 18521.5. The proposed regulation is inconsistent with the Act because a general purpose committee is defined in the Act to mean *all committees* formed or existing to primarily support or oppose more than one candidate or ballot measure, unless

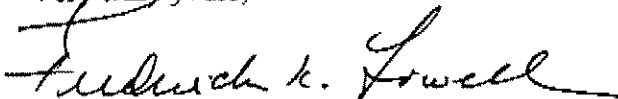
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it is a primarily formed committee as defined in the Act (which means supporting a single measure or candidate). (Section 82027.5.) The Act does not limit who may create a general purpose committee, but instead states that all committees have the capacity to be formed as general purpose committees. Restricting this power exclusively to those committees not controlled by candidates directly contradicts this section of the Act. If a candidate wishes to create a committee to support or oppose multiple ballot measures, the Act provides that opportunity. The FPPC does not have the authority to deprive candidates of this political option.

Candidate-controlled general purpose ballot measure committees are established as a means for raising money to support or oppose various ballot measures. The committee does not raise money in support of the controlling candidate. Therefore, if there is to be an underlying presumption that candidate-controlled general purpose committees are established to further the election of controlling candidates, such a presumption would have to be enacted by the Legislature, or the People through the initiative process, not adopted by this Commission without statutory support or findings of fact.

Proposed regulation 18521.5 does not carry out the purpose of the Act because it undermines the emphasis on providing a fair and equitable opportunity to participate in the elective and governmental process. Its language is inconsistent with the Act which, through its unambiguous and unqualified definition of "general purpose committees", is designed to preserve the ability of persons, candidate or otherwise, to pool their efforts and to form as general purpose committees or primarily formed committees, depending on the goals of the committee.

Very truly yours,



Frederick K. Lowell

cc: Scott Hallabrin, Esq. (FPPC General Counsel)